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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DCD PARTNERS, LLC, et al.,

Case No. 2:15-cv-03238-CAS-(AJWx)

Plaintiffs.

V.

TRANSAMERICA LIFE
INSURANCE COMPANY, a
corporation, et al.,

Defendants.

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT'S
MOTION IN LIMINE NUMBER 1
TO EXCLUDE EXPERT OPINIONS
NOT IN REPORTS**

Hon. Christina A. Snyder

Hearing Date: August 14, 2017
Time: 11:00am

Trial: August 29, 2017
Complaint Filed: March 18, 2015

1 Plaintiffs submit this Memorandum of Points and Authorities in Opposition
 2 to Defendant's Motion *in Limine* Number One (the "Motion").

3 **ARGUMENTS AND AUTHORITIES**

4 Federal Rule of Civil Procedure 26(e)(1) provides that a party must
 5 supplement an incomplete or incorrect expert report with additional information not
 6 previously known to the party by the time of pretrial disclosures.¹ Here,
 7 July 24, 2017. Pursuant to Rule 37(c)(1), if a party fails to timely disclose
 8 information, the information may be used at trial if the delay was substantially
 9 justified or harmless.² Moreover, even when neither justified nor harmless,
 10 untimely information may be used at trial if exclusion is tantamount to dismissal.³

11 Defendant makes three arguments to exclude Plaintiffs' experts'
 12 (the "Experts") testimony. First, that the disclosures are not timely. Second, that
 13 the disclosures offer new opinions. Third, that the disclosures prejudice Defendant.
 14 The Court should deny Defendant's motion for five reasons.

15 First, the Experts' supplemental reports were timely served. The
 16 supplemental reports, which encompass the information brought to the Court's
 17 attention in the Experts' Sworn Declarations in Opposition to Defendant's Motion
 18 for Summary Judgment on June 17, 2017, were served on July 24, 2017, the
 19 deadline for disclosure.⁴ Thus, Defendant's motion should be denied.⁵

20 Defendant's brief disregards the disclosure deadline. Instead, Defendant

21 ¹ See *Wechsler v. Macke Int'l Trade, Inc.*, 221 F.R.D. 619, 623 (C.D. Cal.
 22 2004) (admitting supplemental report filed on deadline for pretrial disclosures).

23 ² See e.g., *Perez v. First Am. Title Ins. Co.*, 810 F. Supp. 2d 986, 989
 24 (D. Ariz. 2011) (delay substantially justified by late production and court order).

25 ³ See e.g., *U.S. ex rel. O'Connell v. Chapman Univ.*, 245 F.R.D. 652, 655
 26 (C.D. Cal. 2007).

27 ⁴ See Declaration of Maxwell D. Herman ("Herman Decl."), ¶ 2; see also
 28 Supplemental Expert Report of Vincent J. Granieri, attached as Exhibit 3 to the
 Herman Decl.; Supplemental Expert Report of Robert S. Cauthen, attached as
 Exhibit 4 to the Herman Decl.

⁵ See *Wechsler*, 221 F.R.D. at 623.

1 argues that Plaintiffs' supplemental reports are untimely because Plaintiffs failed to
 2 "make any effort" to supplement after the October 5, 2016, expert report deadline.
 3 Defendant conveniently ignores that the overwhelming majority of documentary
 4 evidence in this case (573,006/719,173 documents) was withheld by Defendant
 5 until after the December 16, 2016, discovery cut-off, and then only produced after
 6 Magistrate Judge Wistrich twice-compelled Defendant to do so.⁶ (ECF Nos. 129,
 7 177). Defendant's productions continued until April 2017, despite document
 8 requests having been served on May 5, 2016.⁷ Defendant's dilatory conduct forced
 9 Plaintiffs to postpone the majority of depositions until May and June 2017, as well.⁸

10 Further, as of the rebuttal report deadline of November 8, 2016, Defendant
 11 had not produced a single email, spreadsheet or analysis to Plaintiffs, and produced
 12 only a fraction of the total electronically-stored information in its possession on
 13 December 3, 2016, at Judge Wistrich's behest.⁹ (ECF No. 104). Prior to that date,
 14 Defendant's productions consisted of Plaintiffs' policy forms and policy
 15 information, documents to which Plaintiffs, as policyholders, are always entitled.¹⁰
 16 As a result, the Experts explicitly reserved the right to supplement their initial
 17 reports with subsequently obtained evidence.¹¹

18 Due to Defendant's recalcitrance, the record still was not complete as of the
 19 time Plaintiffs' Opposition to Summary Judgment was due. Plaintiffs had three
 20 additional depositions scheduled, and a pending motion to de-designate privileged
 21 documents.¹² Nevertheless, the Experts prepared sworn declarations identifying

23 ⁶ See Herman Decl., ¶ 3.

24 ⁷ Defendant produced 459,794 on March 17, 2017. See Herman Decl., ¶ 3.

25 ⁸ See Herman Decl., ¶ 4.

26 ⁹ See Herman Decl., ¶ 5.

27 ¹⁰ See *id.*

28 ¹¹ See Initial Expert Report of Vincent J. Granieri, attached as Exhibit 1 to
 the Herman Decl., at 2; Initial Expert Report of Robert S. Cauthen, attached as
 Exhibit 2 to the Herman Decl., at 3-4; *Wechsler*, 221 F.R.D. 623.

29 ¹² See Herman Decl., ¶ 6;

1 specific aspects of their initial opinions that were being supplemented with
 2 information obtained through discovery. Defendant cannot, by disregarding Court-
 3 ordered deadlines and the Federal Rules, preclude Plaintiffs from supplementing
 4 their reports by delaying production of crucial evidence.

5 Second, the Experts' supplemental reports do not proffer new opinions.¹³
 6 Defendant argues that Plaintiffs' expert Vincent J. Granieri "offers several new
 7 opinions." Namely, that: (a) "the MDR increase was not consistent with the
 8 TransValue policy terms;" (b) "the smallest appropriate policy class [for a monthly
 9 deduction increase was all TransValue simplified issue policies];" (c) Defendant's
 10 mortality study was inadequate; and, (d) "[Defendant] made misrepresentations in
 11 its marketing materials and illustrations." Defendant is mistaken.

12 Without the benefit of the majority of discovery in this matter, Mr. Granieri
 13 explicitly opined in his initial report: "[M]y opinion is that the April 2013 MD
 14 Increase was not consistent with the Policy terms."¹⁴ He then elucidated why the
 15 increase was not consistent with the policy terms, noting, *inter alia*, that any
 16 increase must be "consistent for all similarly situated policies - that is, those that
 17 belong to the same class," and that, despite "not [having] been given the mortality
 18 study or studies that formed the basis for the increase," Defendant's study was
 19 likely inadequate in the absence of actuarial techniques such as confidence
 20 intervals.¹⁵ This clearly encompasses alleged new opinions (a), (b) and (c). With
 21 regard to alleged new opinion (d), in his initial report, Mr. Granieri opined: "[T]he
 22 marketing of this program to Plaintiff's (sic) was misleading." Mr. Granieri
 23 specifically referenced illustrations.¹⁶ Thus, Defendant's motion should be denied.

25 ¹³ See e.g., *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co.*, 769
 26 F. Supp. 2d 269, 279 (S.D.N.Y. 2011).

27 ¹⁴ See Exhibit 1 to the Herman Decl., at 4.

¹⁵ See *id.* at 5.

¹⁶ See *id.* at 6.

1 Defendant also avers that Plaintiffs' expert Robert S. Cauthen proffers a new
 2 opinion concerning the meaning of "mortality." In his initial report, Mr. Cauthen
 3 opined that Defendant used an unsuitable product and underwriting for insureds
 4 affiliated with several foundations, including PIC, a mismatch highly likely to
 5 result in a monthly deduction increase for the class.¹⁷ Subsequent discovery
 6 indicates that Defendant discriminatorily increased the monthly deductions for
 7 Plaintiffs based solely on PIC's mortality, and not the mortality of a class.¹⁸ In light
 8 of that new information, it was necessary for Mr. Cauthen to supplement his report
 9 to indicate that his initial opinion assumed any increase due to mortality would be
 10 on a class basis (as would be consistent with the policy terms). Thus, the Experts
 11 do not proffer new opinions and Defendant's motion should be denied.

12 Third, even if the Court finds that the Experts' supplemental reports do
 13 proffer new opinions, and it should not, any alleged delay was substantially
 14 justified and harmless. As laid out, above, Defendant's chosen course of conduct
 15 throughout discovery, one of delay, obfuscation and obstinacy, is the direct cause of
 16 any allegedly untimely opinions.¹⁹ In fact, the Experts continue to receive
 17 probative information spoliated by Defendant by way of NANM, Defendant's
 18 general agent, and only recently obtained the deposition of NANM employee Fred
 19 Albracht, the actuary who first proposed the cost of insurance increase to
 20 Defendant, on July 11, 2017.²⁰ Thus, any alleged delay was substantially justified.

21 In addition, any alleged delay did not result in harm. By choice, Defendant
 22 has yet to depose the Experts. Their depositions are currently set for August 8 and
 23 August 9, two weeks after service of the supplemental reports and nearly two
 24

25 ¹⁷ See Exhibit 2 to the Herman Decl., at 8, 14.

26 ¹⁸ See Pl.s Opp. to Def.'s Mot. Summ. J. (ECF No. 243), at 11-14.

27 ¹⁹ See e.g., Perez, 810 F.Supp.2d at 989 (delay substantially justified where
 data produced after rebuttal report deadline, and 2 months after discovery order).

28 ²⁰ See Herman Decl., ¶ 7.

1 months after the Experts' sworn declarations were filed.²¹ Thus, Defendant will
 2 have every opportunity to explore the Experts' alleged new opinions. In addition,
 3 Defendant has been on notice of the Experts' alleged new opinions since
 4 June 17, 2017, when the Experts filed the sworn declarations.

5 Fourth, if the Court finds that the supplemental reports offer new opinions,
 6 Plaintiffs respectfully submit that lesser sanctions are appropriate where, as here,
 7 exclusion is tantamount to dismissal.²² The opinions Defendant identifies as "new"
 8 in Mr. Granieri's supplement go to the heart of Plaintiffs' case (which is why they
 9 were included in his initial report). Excluding related testimony by Mr. Granieri
 10 leaves Plaintiffs unable or nearly unable to demonstrate Defendant's contractual
 11 and tortious breaches, achieve remuneration for Plaintiffs, and preserve a program
 12 directly supporting thousands of families and indirectly supporting thousands more.

13 Fifth, Defendant's caselaw is easily distinguishable,²³ and the instant facts
 14 are analogous to those in *Wechsler v. Macke Intern. Trade, Inc.*, 221 F.R.D. 619
 15 (2004), wherein this Court did not exclude expert testimony.

16 For the reasons set forth, Plaintiffs request that the Court deny the Motion.

17 ²¹ See Herman Decl., ¶ 8.

18 ²² See e.g., *U.S. ex rel. O'Connell*, 245 F.R.D. at 655; see also *R & R Sails, Inc. v. Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1246 (9th Cir. 2012).

19 ²³ See e.g., *Encompass Ins. Co. v. Berger*, 2014 WL 12597120 (C.D. Cal. Aug. 12, 2014) (expert withheld new opinions until trial deposition despite no discovery delays; testified a year previous that his opinions were complete); *Wong v. Regents of Univ. of California*, 410 F.3d 1052 (9th Cir. 2005) (disability expert in ADA lawsuit not disclosed until after defendant filed for summary judgment); *Smartmetric, Inc. v. Mastercard Int'l, Inc.*, 2013 WL 12108250 (C.D. Cal. Oct. 2, 2013) (in patent case, where "treatises propose strictly ordered discovery," untimely new opinion not justified because expert did not primarily rely on documents unavailable prior to the expert disclosure deadline); *Estate of E.H. v. City of Pasadena*, 2010 WL 11508333 (C.D. Cal. Mar. 16, 2010) (expert had already been deposed and proffered no excuse for untimely supplement); *Jarritos, Inc. v. Reyes*, 345 F. App'x 215 (9th Cir. 2009) (initial report not served until after deadlines for disclosure and expert discovery); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101 (9th Cir. 2001) (initial report served two years after the close of discovery and 28 days prior to trial).

1 Dated: July 24, 2017
2

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